

# The Strange (German) Case of Mr. Puigdemont's European Arrest Warrant

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The Court of Justice is being kept busy with European arrest warrants lately. First, the Irish courts wondered if they should enforce European arrest warrants from the UK in light of the imminent withdrawal of this country from the EU. Then another Irish court raised its concerns about the enforcement of arrest warrants coming from Poland, in the aftermath of a reform of the Polish judiciary that has put the country on the brink of an Article 7 TEU procedure. Last week, the high court of Schleswig-Holstein ruled on another tricky case by refusing to enforce an arrest warrant launched by the Spanish Supreme Court, requesting the surrender of Carles Puigdemont, Catalonia's ill-fated former President, in hiding in Belgium since October 2017 in order to escape from the current criminal proceedings taking place in Spain against the instigators of the terrible secessionist acts that took place then.

Brexit, illiberal democracies, and now Catalonia. The European arrest warrant (EAW) is proving to be the laboratory of many of the EU's current headaches, many of them resulting from a new type of techno-populism based on propaganda, lies, obscure finance and a call on the sacred will of "the people". Brexit, Poland and Catalonia find their roots in an ill-conceived conception of democracy, in which the people speak, no matter under what circumstances (fake news, lies, on-line ballots, violent-driven pseudo-referendums) and once the people have spoken the Constitution is put on hold in order to give way to the will of the people. British politicians are terrified of questioning Brexit, even of suggesting a second referendum, because of the will of the people. Illiberal democracies like Poland and Hungary are drifting towards autocratic democracies thanks to the will of the people. Catalan authorities decided to repeal the Constitution, the Catalan Statute of Autonomy and any inconvenient judgment of the Spanish Constitutional Court, because of the will of the people.

The will of the people is the revolutionary new normal, with an ability to destroy all the valuable achievements that European democracies have earned since post-war times. It is thus unsurprising that the will of the people has put its eyes now on the EU itself. As an *apéritif*, the first victim might be the European arrest warrant.

Last week, the *Oberlandesgericht* of Schleswig-Holstein shocked everybody in Spain (and elsewhere too) by refusing to surrender Mr. Puigdemont on the grounds of rebellion, following the European arrest warrant (EAW) issued by the Spanish Supreme Court on two counts (rebellion and embezzlement). In addition, the German court requested additional information from the Spanish Supreme Court on the other crime presumably committed by Mr. Puigdemont (embezzlement), in order to make a definitive decision on that point of the request.

The decision is astonishing on many grounds, and it is not a surprise that the Spanish Supreme Court and the Prosecutor's office made it clear, shortly after, that once the final decision of the German court is rendered, the Spanish Court will make a reference to the Court of Justice.

There is an ongoing discussion in Spain on whether the Supreme Court can make such a reference, which, in my opinion, is a non-issue. The requesting court can always make a reference to the Court of Justice, even if the result is an indirect review of the decision of the executing judge. In the context of European judicial cooperation, disagreements between national courts must be resolved by the Court of Justice, as long as the discussion is based on a point of EU law. In this case, the Spanish Supreme Court has good reasons to disagree with the *Oberlandesgericht's* interpretation of the EAW Framework Decision, a disagreement which is exclusively based on a question of interpretation of a rule of EU law which, eventually, must be solved by the Court of Justice.

What strikes me about the Puigdemont case is the euphoria and epic cries with which the *Oberlandesgericht's* decision has been received by those most close to the Catalan independence movement. These voices have equated the decision to the House of Lords' judgment in the Pinochet case, or to the US Supreme Court's decision in *Brown versus Board of Education*, another example of the contribution of western courts to the defense of human rights.

Nothing is further from the truth.

The *Oberlandesgericht's* decision is a flawed ruling that seriously undermines the EAW's effectiveness, and I would even say its future survival. It is also a manifest example of mistrust between courts of Member States, the type of conduct that destroys the foundations of mutual recognition and judicial cooperation. The fact that the request is coming from a Member State's highest court and it is being rejected by a regional court does not help in keeping the enthusiasm of Supreme Courts with the Area of Freedom, Security and Justice. Quite the contrary. And we all know that once the Supreme Courts of the Member States rebel against EU law, the countdown of the finale has begun.

First and foremost, there is a procedural flaw in the German court's decision. In deciding on the provisional measures imposed on Mr. Puigdemont, the *Oberlandesgericht* rules *ad limine* that the request of surrender based on the offence of "rebellion" is inadmissible, because the conduct would not amount to a conviction in Germany. However, in *Aranyosi and Caldaru* (unquoted in the decision), the Court of Justice, sitting in Grand Chamber, clearly stated that when an executing judge has doubts that can lead to a refusal to enforce an EAW, it has a duty to request further information from the issuing judge (see *Aranyosi and Caldaru*, points 91 to 98). Despite the Court of Justice's ruling, the *Oberlandesgericht* has decided unilaterally and *ad limine*, without giving the chance to the Spanish Supreme Court of enriching the German court's understanding of the case, that Mr. Puigdemont cannot be surrendered on the grounds of the crime of "rebellion". And this decision impedes the Spanish Supreme Court from putting Mr. Puigdemont on trial for this offence. The *Oberlandesgericht* has thus provoked, in a decision ruled in 48 hours and

without full knowledge of the facts of the case, Mr. Puigdemont's acquittal on this ground, which is the most serious of them all. Mr. Puigdemont cannot be put on trial in Spain now for that offence.

But above all, the decision provides a profound misunderstanding of the principle of double incrimination provided in Article 2(4) of the EAW's Framework Decision. It is true that when an offence is not among those listed in Article 2(2), the enforcement judge must determine "whether the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described". Thus, the *Oberlandesgericht* must appreciate if the conduct of Mr. Puigdemont constitutes an offence in Germany (in Germany, the equivalent to "rebellion" is the offence of "high treason", which is even more severe and with higher penalties than under Spanish law).

However, what the enforcement judge cannot do is go through a full review of the case and rule as if it was ruling on the substance of the case. This is what the Court of Justice has been debating lately in the cases of *Grundza* and *Piotrowski* (the latter in Grand Chamber, also ignored by the *Oberlandesgericht*), coming to the conclusion that the review by the executing judge of the application of legal requirements under its domestic law must be made *in abstracto* and not *in concreto*. The executing judge must make sure that the legal requirements under its national law are complied with through an abstract reasoning, but not entering into the details of the specific case, for the simple fact that, otherwise, the executing judge replaces the role of the issuing judge. And it is the issuing judge the one that has the information, the knowledge and the closeness to the facts, witnesses and locations relevant for the criminal proceedings.

I recommend the reader to read the *Oberlandesgericht's* ruling, because it is a perfect example of what an enforcement judge is not supposed to do when evaluating if the facts constitute an offence under its domestic law. The decision basically states that the "violence" used in the events of October 2017 did not put the State or the authority of the State at risk, and that the violence used was insufficient to question the State's ability to impose order. The decision relies on a judgment of the German Supreme Court of the 1950's, in which the violent protests opposing the enlargement of a runway of the Frankfurt airport were considered not to be sufficiently severe to undermine the State's ability to impose order. The *Oberlandesgericht* states that this is an "almost identical case".

And thus, in 48 hours, ruling *ad limine*, without requesting further information from the Supreme Court, and on the grounds of a precedent based on an environmental protest of the 1950's, Mr. Puigdemont has become acquitted of the most serious of the offences for which he would be put on trial before the Spanish Supreme Court.

The case is a good example of a flawed understanding of the Framework Decision and of the case-law of the Court of Justice, because it evidences how catastrophic this approach can be for the EAW as such. For the sake of argument, let's suppose that Mr. X has a criminal plan that will take place, for example, in France. The first thing he must do is to adapt the plan and his conducts to one of the offences that are not enumerated in the list of Article 2(2) of the Framework Decision. Immediately after committing the offence, Mr. X moves to a nearby Schengen Member State, which is quite an easy thing to do,

considering that Schengen provides an area of free movement with no frontier controls. It is important that Mr. X moves to a Schengen country in which the offence is slightly different to the offence under French law. And now, if Mr. X is requested to be surrendered by a French judge, he can be quite assured that nothing of the kind will happen. And if he is lucky, the enforcement judge will act as quickly as the *Oberlandesgericht* and in only 48 hours, after making a ruling *ad limine* on the substance of the case with no knowledge of the details nor testimony of the prosecutor, it will have acquitted Mr. X. A new category of free movement of presumed criminals, benefitting from the EAW and Schengen, would have emerged, to the surprise and joy of criminals throughout the EU (and beyond). Once “acquitted” by the executing judge, the French courts cannot put Mr. X on trial for that offence. Mr. X is now free to move, thanks to Schengen, and with the help of the EAW and a law-motivated (but naïve) executing judge.

There are no two identical offences between Member States, all of them have their own nuances, mostly as a result of the case-law of the courts of each Member State. The drafters of the EAW Framework Decision were well aware of this, and that is why they insisted in Article 2(4) that the acts have to constitute an offence, “whatever the constituent elements or however it is described”. This is a way to remind the executing judge that it cannot go into a detailed analysis of the offence in itself, nor of the facts of the case. Otherwise the EAW would become useless, or it would produce an anomalous substitution of roles by turning the executing judge into the judge of the case.

The Court of Justice, sitting in Grand Chamber, has also made this point quite clear when ruling on one of the grounds of non-enforcement of the EAW: that the person concerned is under sixteen years of age. In the case of *Piotrowski*, when an executing judge questioned if that ground could be applied to other persons older than sixteen, but considered to be in an equivalent position due to their specific psychological features in the law of the executing judge, the Court of Justice argued as follows:

“[...] as an exception to the general rule that a European arrest warrant must be executed, the ground for mandatory non-execution provided for in Article 3(3) of Framework Decision 2002/584 cannot be interpreted as enabling the executing judicial authority to refuse to give effect to such a warrant on the basis of an analysis for which no express provision is made in that article or in any other rule of that framework decision, such as the rule which calls for a determination of whether the additional conditions relating to an assessment based on the circumstances of the individual, to which the prosecution and conviction of a minor are specifically subject under the law of the executing Member State, are met in the present case.

[...] such a determination may cover matters which are, as in the main proceedings, subjective, such as the individual characteristics of the minor concerned and of his family and associates, and his level of maturity, or objective, such as reoffending or whether youth protection measures have previously been adopted, which would in fact amount to a substantive re-examination of the analysis previously conducted in connection with the judicial decision adopted in the issuing Member State, which forms the basis of the European arrest warrant. As the Advocate General observed in point 56 of his Opinion, such a re-examination would infringe and render ineffective the principle of mutual recognition, which implies that there is mutual trust as to the fact that each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome, and does not therefore allow the executing judicial authority to substitute its own assessment of the criminal responsibility of the minor who is the subject of a European arrest warrant for that previously carried out in the issuing Member State in connection with the judicial decision on which the warrant is based.”

It seems clear to me that the Court of Justice is very much worried about the enlargement of powers of executing judges, and that includes, of course, the powers to determine that certain facts “constitute an offence” in the executing Member State. If the executing judge is to undergo a detailed analysis of the facts of the case without having sufficient knowledge of the relevant facts, this, in the words of the Court of Justice (and AG Bot, who is well informed on these issues) would “allow [it] to substitute its own assessment [...] for that previously carried out in the issuing Member State in connection with the judicial on which the warrant is based”.

It seems obvious to me that the *Oberlandesgericht* is not in a position to rule on the substance of the case, and the best proof of this is the way in which it compares Mr. Puigdemont with the leader of an environmental protest in the Frankfurt airport.

Mr Puigdemont was the President of an Autonomous Community in Spain, with full powers and command over all the departments of the regional administration, including the Police, which, in Catalonia, is fully autonomous and replaces in its territory the National Police (this only happens in the Basque Country and Catalonia). After voting in the Catalan Parliament a Referendum Bill that precluded the opposition of submitting amendments or having a debate in the Catalan Parliament, and after disregarding the judgments of the Constitutional Court declaring the Referendum Act (once voted) unconstitutional, Mr. Puigdemont called a referendum on 1 October 2017. This referendum had no electoral guarantees and was facilitated by the inaction of the Catalan Police, under the orders of the Catalan Minister of the Interior, following instructions of the Catalan Government (chaired by Mr. Puigdemont). A few days before the referendum took place, the *Guardia Civil* (after

the High Court of Catalonia decided not to rely on the Catalan Police's authority for obvious reasons) and the High Court's staff were mass-assaulted while carrying a search in the Catalan Ministry of the Economy, in a pursuit for documents that proved that the referendum had been financed with public funds (another offence, embezzlement, on which the Oberlandesgericht has been requested to enforce the EAW). Special forces had to evacuate the agents of the *Guardia Civil* and the High Court through the roof-tops of the Ministry's premises, while demonstrators vandalized the vehicles of the *Guardia Civil* parked outside the building. Many of the remains of these vehicles were found several hours later in Barcelona's cemetery of Montjuïc (a nice final message from the demonstrators to the *Guardia Civil*).

A week later, on the day of the so-called referendum, police charges of the *Guardia Civil* took place, with the result of the awful images we all saw that day in the news. The Catalan Police refused to close down the electoral colleges (despite the Constitutional Court's judgment ruling that the referendum was illegal, followed by an instruction of the High Court of Catalonia ordering all Police authorities to prevent it from happening) and the *Guardia Civil* was left all alone to enforce it. As a result of the *Guardia Civil*'s action, four civilians were hospitalized (one of them suffered a heart attack). In contrast, four-hundred and thirty-one police officers suffered injuries. Indeed, four civilians were hospitalized, but international media (the BBC and the Washington Post, among others) have confirmed that there was a spectacular use of fake news on social media, which manipulated and magnified the violence actually exerted on that day by the *Guardia Civil*.

On 10 October 2017, the Catalan Parliament, with Mr. Puigdemont among its leading members, declared the independence of Catalonia, relying on the "will of the people" after the results of the so-called referendum. Shortly before, Catalonia's main credit institutions, *CaixaBank* and *Banco de Sabadell*, changed seats outside of Catalonia (to Valencia and Alicante, respectively), to calm investor and depositor unrest. Since late September until December 2017, a total of 3217 companies have changed seats from Catalonia to other parts of Spain. The Bank of Spain has confirmed in March 2018 that, since October 2017, 31.400 million euros in deposit accounts have fled from credit institution in Catalan branches.

These facts prove that the perception in Spain and in Catalonia was not that Mr. Puigdemont was leading a peaceful movement, similar to an environmental protest. As Joseph Weiler has recently argued, Mr. Puigdemont is no Nelson Mandela nor a Gandhi, quite the contrary. Mr. Puigdemont was the leader of a well-orchestrated political movement of break-up of a State, that has put a Member State of the EU in an untenable position, close to the brink of secession, with the assistance of the entire Catalan administrative machinery (including its Police and a well-dosed budget), in an effort to divert the attention of its voters from their real concerns (unemployment, austerity, corruption), of which the Catalan government is, of course, co-responsible.

A majority of Catalans see Mr. Puigdemont in the same way (there is no pro-independence majority in Catalonia, it's only thanks to the electoral rules that there is a majority of pro-independence seats in the Catalan Parliament). And I know of no fellow Spaniard outside

of Catalonia that considers Mr. Puigdemont a peaceful protester. It is also very telling that the majority of Basque nationalists disagree completely with the way in which Mr. Puigdemont handled the events in Catalonia.

But the *Oberlandesgericht* of Schleswig-Holstein did not see it this way, ruling in 48 hours, inadmitting the EAW *ad limine*, comparing Mr. Puigdemont with an environmental protester, irrespective of whatever other facts might have been relevant and which the Spanish Supreme Court could have provided, and ignoring the case-law of the Court of Justice of the past fifteen years.

The decision is good evidence that a strict scrutiny of the principle of double incrimination when enforcing EAWs is a questionable practice. The Spanish Supreme Court has now the perfect excuse to cry foul and become an EAW skeptic and, who knows, maybe a euro-skeptic court thereafter. The judge of the Spanish Supreme Court that issued the EAW is currently under Police protection and his summer house in Catalonia was vandalized two weeks ago, provoking a reaction from the European Association of Judges in support of the judge. Seeing Mr. Puigdemont (the leader of the revolt) turned into the heroic victim, and the law-enforcing judge as the villain, with the help of a regional court of another Member State, are the kind of situations that turn a Court, particularly a Supreme Court, into a believer or a disbeliever in integration.

Or it can rely on the tools of the Treaty and make a reference to the Court of Justice, so that the Luxembourg court fixes this terrible and potentially devastating mistake.

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